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ASSIGNMENT "WITHOUT RECOURSE."

When, if at all, may recourse be had upon one who has assigned a chose in action, but expressly "without recourse?" "Not at all," is apt to be the hasty and perhaps natural reply, "the assignee takes at his risk—let him beware." As is frequently the case with "obvious" propositions, however, the law is to the contrary, and in this instance it is believed that reflection will lead to the conclusion that the contrary is "obviously" just. It is not intended in this article to make an exhaustive examination of the authorities in point, but only to review the general principles.

In the article concerning Assignments, 2 R. C. L. 627, it is said:

"Even where the words 'without recourse' are added to an assignment of a chose in action, there still remains an implied warranty that the right transferred is what it purports to be, namely, that it is *a valid and genuine obligation,* based on *adequate and sufficient consideration* and that *the amount of money it calls for was owing and unpaid at the time of the assignment.*" (Italics the present writer's.)

This of itself is sufficient to show that the words in question must not be taken literally, but technically, that is, scientifically, and their meaning, as words of art, is to be ascertained accordingly. Nor, as above indicated, will it be justly said, after an examination of the law in point, that the courts have by construction done violence to the intent of the parties to the contract of assignment. On the contrary, the rulings seem to the writer to embody the common sense of the subject and to make unavailing to an assignor without recourse the process known by the somewhat mysterious expression of "handing the other side a lemon."

A good illustration of the accepted doctrine is to be found in

the leading case of *Mays* v. *Sallison,* 6 Leigh, 230, in which, where a party agreed to have a bond assigned to another without recourse, the words were held not to exempt the contractor from liability where it later appeared that *the bond had been paid.* Said Carr, J.:

> "The very possession of the bond, the claiming it as property, as something binding the obligors, precluded the idea that it was at that moment discharged or satisfied; for then it was no bond; it bound nobody; it was not the representative of money. The bond, too, was payable at a future date; who could have dreamed that it was already mere wax and paper—not a cent due on it?"

The Virginia court thus in effect finds a foundation for its ruling in the healthy principle of estoppel, and this principle, although not invoked *eo nomine,* pervades the decisions of other courts upon the same subject.

In *Ober* v. *Goodridge,* 27 Gratt. 878, which seems to be the latest case in which the Court of Appeals of Virginia has considered the question, an effort was made by an assignee without recourse to apply the doctrine of the preceding case to one of a transfer of a negotiable note after maturity pending suit, where it appeared that the indorser was already discharged by failure in respect to notice—it being contended that, the maker proving insolvent, the transferrer "without recourse" was nevertheless bound for the amount of the note. But the court held otherwise. Said Moncure, P.:

> "The question is whether these words are to be construed in this case according to their literal sense, at least so far as to embrace the risk in regard to the sufficiency of proof of the dishonor of the note to charge the endorser; or in the restricted or limited sense in which they were construed by the circuit court? This court is of opinion that they ought to be construed in their literal sense, at least so far as to embrace the said risk, and not in the restricted and limited sense aforesaid; and that such was the manifest intention of the parties." [1]

1. In the early case of Crawford *v.* McDonald, 2 Hen. & M. 199, an agreement under seal for the conveyance of land was assigned without recourse, accompanied by a paper purporting to be a grant, together with certificates as to title, which papers proved to be

An interesting and recent case in point is *Trustees of Broaddus Institute* v. *Siers,* 68 W. Va. 125, 69 S. E. 148. It is also reported, with an informing note, in Ann. Cas. 1912A, p. 920. It was there held that *in the transfer of a chose in action by an assignment without recourse, there is an implied warranty by the assignor against loss to the assignee by entire or partial failure of consideration.* Per Poffenbarger, J.:

> "The assignor warrants that the bill, note or bond is genuine and that the amount of money it calls for was owing and unpaid at the time of the assignment, in the absence of an express agreement to the contrary."

In support of this, numerous decisions are cited, among them *Whitworth* v. *Adams,* 5 Rand. (Va.) 333. This case concerns principally the subject of usury, the opinion of Judge Carr, it may be noted in passing, containing an interesting presentation of many of the shifts and devices resorted to by those who are not content with the legal rate of interest. The report of the decision covers nearly one hundred pages but does not seem to contain a statement of the fact that the assignment was without recourse. In the West Virginia case the following from 7 Cyc. 831-2 is vouched:

> "The transferrer of commercial paper, even where endorsed 'without recourse,' warrants the validity of the instrument. Thus he is held impliedly to warrant that the paper is supported by a valid consideration, that it is properly stamped, that prior parties had capacity to contract, that the instru-

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forgeries. It was held that the assignor was not liable, there being no proof of fraud or knowledge of fraud on his part. Concerning this ruling, it must suffice to say that it is not the law to-day. The genuineness of the written evidence of the chose assigned is one of the things impliedly warranted by an assignor without recourse. Mr. Call, counsel for the unsuccessful assignee, was only a century ahead of his age, anticipating, as he did with substantial correctness the modern doctrine, when he argued that "when a bond is assigned 'without recourse,' all that is understood by it is that the assignor means to be exempt from all recourse, if the obligor proves insufficient; but if the bond be forged, he would be liable, because money had been paid the assignee for a thing upon which no recovery could be had."

> ment is still subsisting as a valid obligation, and in general that there is no legal defense growing out of his own connection with the paper."

Thus broadly is the law stated, an assignor without recourse being declared. subject to recourse upon at least six varying grounds. But this is not all.

FRAUD. In *Prettyman* v. *Short,* 5 Harr. 260, the Supreme Court of Delaware held that upon the assignment of a chose in action, even without recourse, there is an implied warranty that the chose in action was not invalid in its inception by reason of its having been procured by fraud and deceit.

USURY. So also as to usury. *Drennan* v. *Bunn,* 124 Ill. 175, 16 N. E., 100, 7 Am. St. Rep. 354; *Challis* v. *McCrum,* 22 Kan. 157, 31 Am.

> The case last mentioned is frequently cited. Said Brewer, J.: "The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as if it were no note. This was a defect in the very inception of the note. It was known to the vendor and it arose out of his own dealings in the matter. By all these authorities, there is an implied warranty for such a defect, and the vendor is liable for a breach thereof."

Compare *Fant* v. *Fant,* 17 Gratt. 11. The assignee of a bond transferred it for value, *without assignment,* but undertook verbally to guaranty it, should the transferee call upon him to do so to enable him to dispose of it. *Held,* that if the transferrer knew that there was usury, he was guilty of a deceit and liable, though he did not endorse the bond.

AMOUNT DUE. There is an implied warranty that the amount purporting to be due on the obligation assigned without recourse is the true amount. In *Ticonic Bank* v. *Smiley,* 27 Me. 225, 46 Am. Dec. 593, another leading case, where the holder of a note indorsed it. "indorser not holder," it was held that he was liable for loss to the indorsee due to the fact that payments had been made upon the note or that the maker had a right of set-off against the note. This is the same principle as that of *Mays* v. *Callison, supra,* when the Virginia judges thought it only

just that the "security" be regarded as something more than "mere wax and paper."

TITLE. One who assigns or indorses without recourse a chose in action impliedly warrants his title thereto. *State* v. *Corning Sav. Bank,* 139 Ia. 338, 115 N. W. 937.

SOLVENCY. The general doctrine seems to be that where the assignment is without recourse, there is no implied warranty of the solvency, present or future, of the parties liable thereon. *Challis* v. *McCrum, supra; Hecht* v. *Batcheller,* 147 Mass. 335, 17 N. E. 651; 9 Am. St. Rep. 708; *Houston* v. *McNeer,* 40 W. Va. 365, 22 S. E. 80.

In the Massachusetts case, the payees of a promissory note sold it through a broker, "without recourse," two hours after the makers had made a voluntary assignment, neither buyer, seller, or broker knowing of that fact. *Held,* that the buyer could not recover of the seller on the ground of failure of consideration or mistake, as he got the identical note he bargained for, nor on an implied warranty, and that he must bear the loss himself. The court criticized *Harris* v. *Bank,* 15 Fed. 786, as in conflict with the weight of authority and added:

> "We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party at the time of the sale spoke of or inquired about or knew anything about the failure of the makers. They stood upon an equal footing and had equal means of knowing the standing of the maker. They did not expressly warrant the value of the note and we are of opinion that no warranty could fairly be inferred from the circumstances of the solvency of the makers, or that they continued in business."

See also *Ware v. McCormick,* 96 Ky. 139, 28 S. W. 157, 959; *Carroll* v. *Nodine,* 41 Ore. 412, 69 Pac. 51, 93 Am. St. R. 743.

A point of much practical importance is ruled in the Illinois case of *Drennan* v. *Bunn, supra,* where it was held that the assignor of a chose in action without recourse, liable as above indicated because the obligation was tainted with usury, is concluded by a judgment between the purchaser and the payor, pro-

vided he had notice of the pendency of the suit, although he was not expressly notified to become a party to the suit, or notified by the purchaser that he would be held bound by the judgment. The importance of this decision is manifest, not only in cases presenting facts of the same general nature, but of an analogous kind, e. g., cases predicated upon facts of forged or fraudulently raised checks, covenants of warranty of real estate and the like. Said the court:

> "Where one party is liable to indemnify another against a particular loss, it is because, by law or by contract, the primary liability for such loss is upon the party indemnifying; and in such instances the party bound to indemnify is in privity with the party to be indemnified, and he therefore has a direct interest in defeating any suit whereby there may be a recovery as to the subject-matter of the indemnity against the party to be indemnified. Rawle, in his work on 'Covenants of Title' (2d Ed. 242) after alluding to the ancient practice of 'vouching to warranty,' says: 'Partly, perhaps, from analogy to that practice, it is well settled in this country, in most, if not in all of the states, that, in general, upon suit being brought upon a paramount claim against one who is entitled to the benefit of a covenant of warranty, the latter can, by giving proper notice of this action to the party bound by that covenant, and requiring him to defend it, relieve himself from the burden of being obliged afterwards to prove, in the action on the covenant, the validity of the title of the adverse claimant.'"

The opinion is a learned and able one, citing abundant authority, English and American, and should be "common-placed" by all interested in the subject of warranties, whether as incidents of negotiable paper or otherwise.

NEGOTIABLE INSTRUMENTS.

Thus far we have been considering the subject from the standpoint of choses in action generally, though with occasional references to commercial paper. Limitations of space do not permit an extended inquiry into what may be called the subdivision of negotiable instruments. It must suffice to reproduce the following statement of the law from Daniel's *Law of Negotiable Instruments,* Sixth Edition, section 820:

"When the instrument is 'without recourse' the indorser spe-

cially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is nevertheless liable if he draws upon a fictitious party or one without funds. And, therefore, the holder may recover against the indorser 'without recourse,'

(1) if any of the prior signatures were not genuine; or
(2) if the note was invalid between the original parties, because of the want of, or illegality of, the consideration; or if
(3) any prior party was incompetent, or if
(4) the indorser was without title."

IBID. *"Under Negotiable Instrument Statute."*[2] Under a warranty on negotiating an instrument by a qualified indorsement, it has been held that upon an indorsement, 'by agreement with recourse after all security has been exhausted, waiving protest,' until such security is exhausted, no cause of action accrues against the indorser, and he can not therefore be joined with the mortgagor as a defendant in an action to foreclose such mortgage, and that an indorsement 'without recourse' does not obviate the liability involved in the warranty of genuineness and title."

To sum up, it is not too much to say that the expression "without recourse" seems almost to mean its converse—that is, that when an assignor makes this express reservation, he must be understood to mean that recourse may nevertheless be had upon him except upon the point of the solvency of the party obligated in the chose assigned, and perhaps one or two others. Thus the subject may fairly be classed among the curiosities of the law.

This presentation of it may be appropriately concluded with the excellent analysis of the reason of the law contained in the

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2. The statute in point is as follows: "Sec. 39. **Qualified Indorser.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser s signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

opinion of the Supreme Court of Vermont in *Hannum* v. *Richardson,* 48 Vt. 508, 21 Am. Rep. 152:

> "By indorsing the note 'without recourse,' the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability, it may perhaps be regarded as standing *without an indorsement.* If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. . . . In this case the note in question was given for intoxicating liquor sold in this state in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it imported to be, or what it was sold and purchased for; it is of no more effect than if it had been a piece of blank paper for which the plaintiff had paid his fifty dollars. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand."

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